IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.749 OF 2007

Mahadeo Nagu Hupare ...Applicant

vs.

Appasaheb Bharama More & Ors. ...Respondents

Mr.N.J.Patil for the Appellant
Mr.Prashant Kulkarni for Respondent Nos.2 to 5.

CORAM: A.S.OKA,J.
DATE : NOVEMBER 26,2007.

JUDGMENT:

1. Heard the learned Advocate appearing for the Appellant and the learned Advocate for the Respondents. Following substantial questions of law arise :

i) Whether the Appellate Court could have heard and decided the Appeal in absence of the Appellant only on the basis of a pursis of no instruction filed by the Advocate for the Appellant in as much as the Advocate for the Appellant had not obtained a permission to withdraw his Vakalatnama as contemplated by the rules framed by this court under section 34 of the Advocates' Act 1961?

ii) Whether the Appellate Court has committed an error while interpreting the provisions of the Bombay Money Lenders Act ?

2. Second Appeal is admitted on the aforesaid substantial questions of law. The Advocate for the Respondent waives service. Considering the facts and circumstances of the case, Appeal is forthwith taken up for hearing.

3. The Appellant filed a money suit against the Respondents which came to be decreed by the trial court. One of the contentions raised by the Respondents was that the suit transaction was a money lending transaction and as the Appellant was not possessing the requisite money lending licence, the suit filed by the Appellant was not maintainable. An Appeal preferred by the Respondent was allowed by the impugned Judgment and decree. In the impugned Judgment and decree the Appellate Court has observed that when the Appeal was fixed on 5th April 2003, the Advocate for the Appellant filed no instruction pursis along with an office copy of the letter sent to the Appellant along with the acknowledgment receipt. After recording this factual aspect, the Appellate Court proceeded to decide the Appeal on merits and has set aside the decree on the ground that the suit transaction was a money lending transaction and the suit was not maintainable as the Appellant was not possessing the requisite licence.

4. This court has framed rules under section 34 of the Advocates Act, 1961. Sub rule 4 of rule 8 of the said Rules prescribe the procedure to be followed when an Advocate who

has filed appearance for a party wishes to withdraw his appearance. The said rule provides that a leave of the court has to be obtained by the Advocate to withdraw his appearance after following the procedure prescribed by the rule. Even the sub rule 3 of Rule 4 of Order III contemplates that the appearance of the Advocate shall be deemed to be in force until determined with the leave of the court.

5. In view of the decision of this court in case of Dattusingh Vs. Bhagwant [2005 (2) Mh.L.J. page 743] the act of filing no instruction pursis by the Advocate by itself does not amount to grant of leave by the court to withdraw his appearance. The court is required to apply its mind by passing a reasoned order. In a given case the Court has discretion not to grant leave. This court has also held in the case of Annasaheb Vs. Dada [2005 (2) Mh.L.J. page 221] that unless there was a specific direction by the Appellate court to the Appellant to personally remain present in the Court, the Appellant was under no obligation to personally remain present on the date on which the Appeal was heard. The learned Appellate Court seems to have proceeded on erroneous assumption that once a no instruction pursis is filed by an Advocate, the Advocate is absolved from the requirement of appearing in the Appeal.

6. As a result, the Appeal has been decided without hearing

the Appellant and the decree passed in favour of the Appellant has been set aside. Only on this ground, the impugned Judgment and decree deserves to be quashed and set aside and the Appeal will have to be re-heard. It is not necessary to deal with other contentions raised on merits.

7. Hence, I pass the following order :

i) Impugned Judgment and Decree dated 11th November 2003 is quashed and set aside. Regular Civil Appeal No.362 of 2000 is restored to the file.

ii) Now, this Appeal will have to be heard afresh by the learned Additional District Judge at Icchalkaranji, District Kolhapur. Parties are directed to appear before the learned Additional District Judge, Icchalkaranji on 14th January 2008 at 11.00 a.m. It is made clear that no further notice of the Appeal shall be served to the parties.

iii) The Appellant shall not ask for adjournment on any unreasonable grounds. The Appeal shall be disposed of as expeditiously as possible.

iv) Interim order, if any, operating in favour of the respondents during the pendency of the Appeal shall continue to operate till the final disposal of the

Appeal.

v) All contentions of the parties on merits of the Appeal are expressly kept open.

vi) Appeal is partly allowed in above terms. The Appellant will pay costs of this Appeal to the Respondent quantified at Rs.3,000/-. Deposit of the amount of costs with the lower Appellate Court within a period of eight weeks from today will be treated as a sufficient compliance with this order.

vii) Writ to be sent immediately.

viii) Lower Appellate Court and the parties to act upon an authenticated copy of this order.

JUDGE